

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HOWARD AYERS,

Plaintiff,

v.

ORDER
05-CV-889A(F)

T. ROBERTS, Correction Officer,
A.F. ZON, Superintendent,
K. FIEGL-BOCK, Senior Corr. Counselor, and
TURMBO, Correctional Officer B=Block Hall Captain,

Defendants.

This case was referred to Magistrate Judge Leslie G. Foschio, pursuant to 28 U.S.C. § 636(b)(1), on August 18, 2006. On August 14, 2007, defendants filed a motion for summary judgment. On March 19, 2008, Magistrate Judge Foschio filed a Report and Recommendation, recommending that defendants motion for summary judgment be granted as to plaintiff's retaliation claim against defendant Roberts, plaintiff's supervisory liability claim against defendant Zon, and plaintiff's due process claim against defendant Fiegl-Bock, but denied as to plaintiff's religious freedom claim against defendant Turnbull.¹

¹

Defendant Turnbull is incorrectly named in the complaint as "Turmbo."

Defendant Turnball filed objections to the Report and Recommendation on March 27, 2008, and plaintiff filed objections on May 8, 2008.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a de novo determination of those portions of the Report and Recommendation to which objections have been made. Upon a de novo review of the Report and Recommendation, and after reviewing the submissions, the Court adopts the proposed findings of the Report and Recommendation.

In his objections, defendant Turnball argues that the Magistrate Judge erred by failing to consider his argument that causing plaintiff to miss a single religious meal was merely a de minimis burden and therefore did not constitute a cognizable deprivation of plaintiff's First Amendment rights or his rights under the Religious Land Use and Institutionalized Person Act of 2000. In support of his argument, defendant cites to the case of Ford v. McGinnis, 230 F. Supp.2d 338 (S.D.N.Y. 2002). That case, however, was overruled on appeal by the Second Circuit. See Ford v. McGinnis, 352 F.3d 582 (2d Cir. 2003). The Second Circuit held that "the Eid ul Fitr feast is sufficiently unique in its importance within Islam to distinguish the present case from those in which the mere inability to provide a small number of meals commensurate with a prisoner's religious dietary restrictions was found to be a de minimis burden." Id. at 594 n.12; see also Shakur v. Selsky, 391 F.3d 106, 120 (2d Cir. 2004).

Accordingly, for the reasons set forth in Magistrate Judge Foschio's Report and Recommendation and herein, the Court grants defendants' motion for summary judgment as to plaintiff's retaliation claim against defendant Roberts, plaintiff's supervisory liability claim against defendant Zon, and plaintiff's due process claim against defendant Fiegl-Bock, but denies the motion as to plaintiff's religious freedom claim against defendant Turnbull.

This case is hereby referred back to Magistrate Judge Foschio for further proceedings, including appointment of counsel to represent plaintiff on his religious freedom claim against defendant Turnbull.

SO ORDERED.

s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

DATED: May 15 , 2008